

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

25710

**FILE:** B-211046

**DATE:** July 12, 1983

**MATTER OF:** Raymond Engineering, Inc.

**DIGEST:**

When invitation requires submission of test data after bid opening, data is to be used to enable procuring agency to determine bidder's competency to perform, rather than to establish characteristics of product, so that requirement relates to bidder responsibility, not bid responsiveness, and data may be submitted at any time up to award. Rule is not affected by solicitation statement that failure to submit data by a specific date will render bid nonresponsive.

Raymond Engineering, Inc. protests the award of a Federal Supply Schedule contract to Consolidated Services, Inc. under invitation for bids (IFB) No. MPN-MSG0820-D2-F, issued by the General Services Administration (GSA). The solicitation covered various hand and power tools; Item 6, a torque multiplier wrench, is the only one at issue. Raymond contends that Consolidated's bid should have been rejected as nonresponsive because Consolidated did not submit test data by the date specified by GSA. We deny the protest.

The solicitation, issued on September 23, 1982, was amended twice. The first amendment extended the bid opening date from October 29 to November 12, 1982, in order to allow bidders time to complete tests of Items 6 and 8 and to submit data on them with their bids. The second amendment, issued on October 28, 1982, retained the November opening date but allowed bidders more than 3 additional months to meet the test data requirement. The second amendment provided in pertinent part:

"Items 6 and 8 will require test data [to] be submitted prior to award. The test report must address each requirement of the purchase description in the solicitation. The test must be performed by an independent lab at

the contractor's expense and witnessed by a representative of the Government. Test data must be submitted no later than February 25, 1983. \* \* \* Failure to submit the test data will render the bid nonresponsive. \* \* \*

Two bids were received on November 12, 1982: Consolidated bid \$1,799 per wrench, while Raymond bid \$2,764 per wrench. Raymond submitted the required test data on February 25, 1983. Consolidated's sample was tested at the Naval Air Station in Pomona, California on February 22, 1983. According to GSA, the branch manager at the Naval Laboratory verbally informed the contracting officer the following day that the test had gone well except for the accuracy requirements, which Consolidated had "failed by a small degree." Since there was some doubt as to whether the results of the accuracy test were statistically correct, a second test was held on March 3, 1983. Consolidated's sample passed this in all respects, GSA states, and the contracting officer received final written results on March 11, 1983.

Raymond contends that Consolidated's bid is nonresponsive because the firm failed to furnish test data on February 25, 1983. Raymond argues that the amendment quoted above relates to bid responsiveness, rather than bidder responsibility, and that GSA has permitted Consolidated to have "multiple bites at the apple" by allowing it to make a nonresponsive bid responsive. Alternatively, Raymond asserts that by extending the date for submission of Consolidated's test data, the contracting officer improperly amended the IFB without notice to Raymond. In its initial protest Raymond also asserted that Consolidated had not employed an independent lab but had performed the tests itself. In view of GSA's statement that Naval personnel conducted the tests at Pomona Naval Air Station, an "independent" Government laboratory, Raymond appears to have abandoned this basis of protest.

The first question for our resolution is whether the submission of test data relates to responsiveness or responsibility. Responsiveness concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation; responsibility refers to the bidder's apparent ability and capacity to perform all of the contract

requirements. See Skyline Credit Corporation, B-209193, March 15, 1983, 83-1 CPD 257. The distinction between the two concepts is not always easy to draw, as some solicitation provisions seem to relate both to the bidder and to the product, and it becomes necessary to ascertain the intention of the agency by examining the wording of the solicitation. See National Energy Resources, Inc., B-206275, February 1, 1983, 83-1 CPD 108. We believe the interpretation advanced by the procuring agency must be carefully considered, since that agency is normally in the best position to set forth what was intended. Cubic Western Data, Inc., 57 Comp. Gen. 17 (1977), 77-2 CPD 279. However, a contracting agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation. See Watch Security, B-209149, October 20, 1982, 82-2 CPD 353.

Applying these general rules to the procurement in question, it is clear that Consolidated's bid was responsive. The firm did not take exception to any portion of the purchase description for Item 6, and thus has unequivocally offered to provide wrenches that conform in all material respects to the solicitation.

Further, in the context of the solicitation, we find that the test data requirement affects Consolidated's responsibility, since its purpose appears to have been to establish--before award--Consolidated's ability to produce a wrench meeting GSA's specifications. This, in our opinion, is clearly distinguishable from a procurement in which test data is required to establish the characteristics of a product that cannot be adequately described in specifications or a purchase description. In the latter case, the data would be needed for evaluation, and failure to provide it at bid opening would render a bid nonresponsive. See B-174467, February 4, 1972, citing B-169330, May 14, 1970.

Here, GSA set a date more than 3 months after bid opening for submission of the test data and, by amendment of the solicitation, notified all offerors of this date. It is a firmly established principle of formal advertising that the responsiveness of a bid is determined on the basis of that bid as submitted, and not on the basis of information provided after opening. See Abbott Power Corporation, B-186198, January 7, 1977, 77-1 CPD 13. Therefore, despite

GSA's statement that failure to submit the data by February 25, 1983, would render a bid nonresponsive, since the test data was not to be furnished with the bid, the failure to furnish it legally could not involve a matter of bid responsiveness. Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD \_\_\_\_.

Raymond cites Western Waterproofing Co., B-183155, May 20, 1975, 75-1 CPD 306, for the proposition that test data requirements involving the item to be furnished go to responsiveness. That decision concerns a restoration project for the Old Mint Building in San Francisco, California; data was required to show that the synthetic or natural stone to be used by the contractor would meet specific criteria for quality and physical compatability, and was to be submitted with bids, so that the agency could determine precisely what bidders proposed and would be bound to furnish if awarded the contract. We do not find the case applicable here, since the test data was not to be submitted with bids.

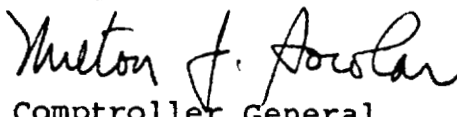
Nor do we find merit in Raymond's contention that the test data requirement is analogous to one for descriptive data; the cases cited by Raymond are distinguishable. In Sutron Corp., B-205082, January 29, 1982, 82-1 CPD 69, a brand name or equal procurement, a bid for an "equal" product was rejected for lack of evidence of compatability of proposed computer software with an existing earth satellite-ground receiving station operating system. In Sprague & Henwood, Inc., B-201028, April 6, 1981, 81-1 CPD 260, and Fabcraft, Inc., dba FABCO, B-186973, November 5, 1976, 76-2 CPD 384, bids were rejected because descriptive literature submitted with them did not demonstrate whether the products offered complied with specifications. In each of these cases, the descriptive data was required for bid evaluation; we find them inapposite here. See Cubic Western Data, supra.

Raymond further asserts that Consolidated has been given "multiple bites at the apple." This concept refers to a situation in which a bidder, after opening, has an opportunity to make an otherwise nonresponsive bid responsive. See Consolidated Services, Inc., B-206413.3, February 28, 1983, 83-1 CPD 192. The concept does not apply here, since Consolidated's bid was responsive.

Finally, Raymond contends that the contracting officer improperly attempted to amend the IFB for the benefit of Consolidated, without notice to Raymond. We do not consider the extension of the due date for test data beyond February 25, 1983, to be an amendment of the solicitation. It appears that the date was established by GSA for its own convenience, and we do not believe that it conferred any enforceable rights on bidders. Moreover, in view of our finding that the tests concerned Consolidated's responsibility, the test results, as noted above, could have been submitted any time up to award.

In this regard, we note that GSA actually approved an award to Consolidated, notwithstanding Raymond's protest, on June 1, 1983, on grounds that failure to do so would unduly delay delivery to Federal Supply Schedule customers and that Consolidated's bid price, which was \$965 a unit less than Raymond's, was likely to result in an annual savings of approximately \$530,000.

The protest is denied.

*for*   
Comptroller General  
of the United States